Supreme Court, U.S.
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No. 97-

IN THE

Supreme Court of the United States

October Term, 1997

UNITED ARTISTS THEATRE CIRCUIT, INC., LANDMARK THEATER CORPORATION AND MOVIES, INC.,

Petitioners

vs.

CITY OF NEW ORLEANS, DEPARTMENT OF FINANCE, MARINA M. KAHN, DIRECTOR,

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Louisiana Courts err in refusing to evaluate the content based and discriminatory City of New Orleans Ordinance imposing a *special* Amusement Tax on Free Speech activities for its constitutionality under a heightened/strict scrutiny standard of review?

2. Did the Louisiana Courts err in holding that an intent to discriminate must be present in order to find content based legislation unconstitutional under the First Amendment despite this Court's jurisprudence which holds otherwise?

PARTIES AND CORPORATE DISCLOSURE

The undersigned counsel of record certifies that the persons and entities listed below are parties in this proceeding.

Petitioners:

United Artists Theatre Circuit, Incorporated, is a Maryland corporation with its principal place of business in Englewood, Colorado, qualified to do business in the State of Louisiana (See the chart on Pages iii-iv for a detailed listing of parent corporations and nonwholly owned subsidiaries);

Landmark Theater Corporation, is a California corporation with its principal place of business in Los Angeles, California qualified to do business in the State of Louisiana (See the chart on Page v for a detailed listing of parent corporations and wholly owned subsidiaries); and

Movies Incorporated, is a Louisiana Corporation that has no nonwholly owned subsidiaries or affiliates and which has its principal place of business in New Orleans, Louisiana;

Respondent:

Marina M. Kahn, is the Director of the Department of Finance for the City of New Orleans, State of

Louisiana.

United Artists Theatre Circuit, Incorporated		
Parent (State of Incorporation)	**Ownership** (%)	**Subsidiary** (State of Incorporation)
Oscar I Corporation (DE)	100%	United Artists Theatre Circuit, Inc. (MD)
United Artists Theatre Circuit, Inc. (MD)	100%	UA Property Holding II, Inc. (CO)
UA Property Holding II, Inc. (CO)	75%	King Reavis (CA)
UA Property Holding II, Inc. (CO)	50%	Magnolia Amusement Company (AR)
United Artists Theatre Circuit, Inc. (MD)	67%	Multimatic Displays, Inc. (NY)
UA Property Holding II, Inc. (CO)	50%	R&S Theatres, Inc. (MS)
UA Property Holding II, Inc. (CO)	75%	San Francisco Theatre, Inc. (CA)
UA Property Holding II, Inc. (CO)	50%	Trumball Theatre Corp. (CT)
UA Property Holding II, Inc. (CO)	50%	UAGG Theatre Operating Corp. (NY)
UA Property Holding II, Inc. (CO)	50%	Vogue Realty Company (CA)
UA Property Holding II, Inc. (CO)	5%	Bagley Building Company (MI)

United Artists Theatre Circuit, Incorporated		
Parent (State of Incorporation)	**Ownership** (%)	**Subsidiary** (State of Incorporation)
United Artists Theatre Circuit, Inc. (MD)	99.9%	United Artists International Ltd. (Hong Kong)
UA Property Holding II, Inc. (CO)	.1%	United Artists International Ltd. (Hong Kong)
United Artists International Ltd. (Hong Kong)	50%	United Artists Cinema Circuit Ltd. (Hong Kong)
United Artists International Ltd. (Hong Kong)	50%	United Artists Singapore Theatres Pte Ltd. (Singapore)
United Artists Theatre Circuit, Inc. (MD)	100%	U.A. Mexico Investment Co., S.A. de C.V. (Mexico)
U.A. Mexico Investment Co., S.A. de C.V. (Mexico)	50%	Cinemas United Artists, S.A. de C.V. (Mexico)
United Artists Theatre Circuit, Inc. (MD)	100%	UA International Property Holding, Inc. (CO)
UA International Property Holding, Inc. (CO)	100%	UATC Europe B.V. (Netherlands)
UATC Europe B.V. (Netherlands)	25%	UATC Argentina S.A. (Argentina)

Landmark Theatre Corporation		
Parent (State of Incorporation)	**Ownership** (%)	**Subsidiary** (State of Incorporation)
Metromedia International Group, Inc. (DE)	100%	Orion Pictures Corporation (DE)
Orion Pictures Corporation (DE)	100%	Goldwyn Entertainment Company (DE)
Goldwyn Entertainment Company (DE)	100%	Landmark Theatre Group (CA)
Landmark Theatre Group (CA)	100%	Landmark Theatre Corporation (CA)
Landmark Theatre Corporation (CA)	100%	San Francisco Landmark Theatre Corporation (CA)
Landmark Theatre Corporation (CA)	100%	Wisconsin Repertory Cinemas, Inc, (WI)
Landmark Theatre Corporation (CA)	100%	Parallax Theatre Systems, Inc. (CA)

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OPINIONS BELOW

The Order of the Supreme Court of Louisiana denying Petitioners' Application for Supervisory Writs is unreported and is printed in its entirety at Appendix A-1. The Order of the Fourth Circuit Court of Appeal for the State of Louisiana denying the Petitioners' Application for Supervisory Writs is unreported and is printed in its entirety at Appendix B-1.

The Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, denying Petitioners' Motion for Partial Summary Judgment, which motion was limited to the issue of the contested Ordinance's unconstitutionality, and that court's Reasons for Judgment are both unreported and are printed in their entirety at Appendix C- 1.

JURISDICTION

The judgment of the Supreme Court of Louisiana (App. A-1) denying the Petitioners' Application for Supervisory Writs was rendered on January 9, 1998. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a) as this petition for certiorari was timely filed within ninety (90) days of that date.

Although there has not been an appealable judgment

on the questions presented for review in the Louisiana Courts, this case warrants a writ of certiorari from this Court because its jurisprudence setting forth the standard for review of legislation burdening fundamental rights is so clear. The lower court has blatantly ignored this Court's pronouncements that such legislation must be subject to a heightened standard of review under the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution:

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V. " . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV. " . . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ordinances:

Article IV, Chapter 150, Section 241, Code of the City of New Orleans, 1995, Appendix D-1.

Article IV, Chapter 150, Section 243, Code of the City of New Orleans, 1995, Appendix D-2.

Article IV, Chapter 150, Section 276, Code of the City of New Orleans, 1995, Appendix D-6.

STATEMENT OF THE CASE

Petitioners are movie theatre operators engaged in the business of displaying films in New Orleans, Louisiana. The City of New Orleans (the "City") levies a five (5%) percent tax ("Amusement Tax") on the gross receipts of any motion picture house. Section 150-276, Code of the City of New Orleans, 1995 ("City Code"). This tax is based on total receipts from admissions and concessions sold at Petitioners' theatres. It is levied in addition to the City's general sales tax. The stated purpose of the City's Amusement Tax is to provide funds for public and quasi-public charitable institutions operated by the City Department of Welfare (now called the Human Services Department) and, in the event of a surplus of funds, to human resources programs as determined by the New Orleans City Council. Section 150-276 and Section 150-315 (App. at D-6 and D-7) of the City Code.

The City ordinance imposing the Amusement Tax, which is set forth in Article IV, Chapter 150, Sections 241 through 317 of the City Code ("Ordinance"), violates Petitioners' rights under the First and Fourteenth Amendments to the United States Constitution because:

(1) It singles out the fundamental right of freedom of speech for special taxation;

(2) The Amusement Tax is a "special tax" which targets

a small group of speakers exercising the fundamental right of Free Speech;

(3) The Ordinance contains content based regulations which impermissibly censor Petitioners' speech; and

(4) The Ordinance creates a special class of taxpayers and unlawfully discriminates within that class without a compelling state interest.

This tax is a "special tax" because it only applies to a small class of taxpayers providing statutorily enumerated amusements, most of which involve the exercise of free speech.[1] Out of 23,524 businesses subject to the City's general sales tax, only 159 of those businesses are subject to both the sales tax and the Amusement Tax. Ninety-four (94%) percent of the revenues generated for the City by the Amusement Tax are derived from taxpayers exercising protected Free Speech activities.

The Amusement Tax is not a tax of general applicability on businesses in the City of New Orleans because it is not applicable to the business community at large. Many entities providing taxable amusements are

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[1] The Ordinance taxes the following First Amendment activities: theatres, motion picture houses, exhibitions, pageants, productions, demonstrations, concerts, musicales, recitals, minstrel shows, lectures, addresses, nightclubs, cabarets, restaurants which provide either floor show, singing, or dancing. Section 150-276 of the City Code.

exempted from paying the Amusement Tax through the beneficence of the New Orleans City Council. See Section 150-243 of the City Code. Petitioners, however, have not had the good fortune of being favored by the Council.

Through the Ordinance, the City of New Orleans encourages certain types of speech, namely, speech that is exercised by and at those businesses which are exempt from paying the tax, and discourages other types of speech such as speech presented at movie theatres and other businesses which are still required to pay the tax. Most importantly, certain taxpayers are exempted from the tax and other taxpayers are taxed *based on the content* of the amusement presented by them.

The City has selected who may exercise First Amendment rights free of taxation, and who may not, by providing an economic advantage to those businesses engaging in favored speech. This is accomplished by a series of complicated and irrational exemptions from the Amusement Tax.

Petitioners are seeking a judgment that the Ordinance imposing the Amusement Tax is unconstitutional as well as damages and a refund of Amusement Taxes paid. They filed a Motion for Partial Summary Judgment in the trial court asking for a declaration of the unconstitutionality of the Ordinance based on the foregoing violations. After taking the matter under advisement, the Honorable Nadine

Ramsey subsequently denied Petitioners' motion and issued Reasons for Judgment which appear in the Appendix at C-3.

These Reasons for Judgment, which did not contain any citations of authority, show that the Civil District Court failed to apply the correct standard of law to this scheme of differential taxation challenged by the Petitioners. Instead, the trial court reviewed the Ordinance under an erroneous standard of constitutional law which is in direct conflict with the rulings of this Court. The trial court incorrectly used the rational basis test in reviewing the constitutionally defective Ordinance. This Court, however, has ruled that strict scrutiny must be used by courts evaluating legislation infringing on the fundamental right of Free Speech. Since the Ordinance infringes upon Petitioners' right to engage in Free Speech, it should have been scrutinized for some compelling state interest that is being furthered by the blatantly discriminatory and content based tax. Furthermore, the trial court incorrectly ruled that an intent to discriminate must be present in order to find the contested legislation unconstitutional.

Petitioners timely filed a Motion for New Trial in response to the trial court's misapplication of the appropriate constitutional standard. That motion was summarily denied by Judge Ramsey less than five (5) days after it was filed, without any hearing on that application.

Petitioners filed an Application for Supervisory Writs with the Louisiana Fourth Circuit Court of Appeal in an effort to correct this clear misapplication of constitutional law. That application was denied. A copy of that Judgment appears in the Appendix at B-1.

Petitioners then filed an Application for Supervisory Writs with the Louisiana Supreme Court seeking an order compelling the trial court to apply the correct standard of review for constitutionality to the Ordinance. The Louisiana Supreme Court denied that application on January 9, 1998 and a copy of that Judgment appears in the Appendix at A-1.

The Civil District Court's refusal to use strict scrutiny in reviewing this differential scheme of taxation has been and continues to be extraordinarily burdensome for the Petitioners. They have been paying the Amusement Tax to the City under protest since filing these suits in January of 1995. If forced to try this case under what is clearly an incorrect standard of law, they will not be relieved of the burden on their fundamental right to Free Speech for at least 2 to 3 more years as a result of the appellate process.

This Court has spoken regarding the correct standard of review for infringements on the right to engage in Free Speech. It has stated in no uncertain terms, as seen by the cases discussed below, that legislation like the Ordinance imposing the Amusement Tax must be subject to

heightened scrutiny by a reviewing court.

State courts should not be allowed to disregard or ignore constitutional standards of law which this Court has so carefully enunciated. Therefore, Petitioners implore this Court's review of the issues presented herein.

REASONS FOR GRANTING THE PETITION

The Civil District Court's application of the wrong standard of law to the City's unlawful scheme of taxation, and the Louisiana appellate court's refusal to correct this error, conflicts not only with the decisions of this Court in *Leathers v. Medlock*, 499 U.S. 439 (1991), *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 198 (1987), and *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), but also with the decision by the Louisiana First Circuit Court of Appeal in *Louisiana Life, Ltd. v. McNamara*, 504 So.2d 900 (La. App. 1 Cir. 1987). The Louisiana Supreme Court's denial of Petitioners' Application for Supervisory Writs only exacerbates this conflict.

It is imperative that the trial court analyze Petitioners' claim that the Ordinance is unconstitutional under the correct standard of law as articulated by this Court, which is one of heightened or strict scrutiny. In spite of clear memoranda of law furnished by Petitioners and the clear

jurisprudence of this Court, the trial judge tested the Ordinance imposing the Amusement Tax for its rational basis and stated that: "The aid to charitable institutions is clearly reasonable and is neither capricious or arbitrary . . ." The trial court also stated in its Reasons for Judgment that Petitioners were required to show an intent to discriminate on the part of the City in order to challenge this legislation. This Court should not allow lower courts to disregard well established constitutional law concerning the protection of fundamental rights.

Since the challenged legislation impinges on a fundamental right protected by the First and Fourteenth Amendments,[2] the trial court should have determined whether or not the City has shown some compelling state

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[2] It is well established and has been admitted by the City in pre-trial discovery that motion pictures constitute a form of speech and hence, they are protected by the constitutional guarantees that safeguard freedom of speech. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). In *Joseph Burstyn, Inc., supra* at 502, this Court ruled that expression by means of motion pictures was included within the Free Speech and Free Press guaranty of the First and Fourteenth Amendments.

More recently, this Court has stated that: "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

interest being furthered by the Ordinance that cannot be achieved by any less intrusive means than the current form of the Ordinance imposing the Amusement Tax. Petitioners need not show an intent by the City to suppress speech in its enactment of the Ordinance or any amendments thereto.

This petition will first set forth the scope of review for constitutionally suspect legislation mandated by this Court which standard should have been employed by the trial court in reviewing the Ordinance. Next, it will show why this standard should have been applied to this Ordinance.

I. Standard of Review for Constitutionally Suspect Legislation Mandated By This Court

The First Amendment to the U.S. Constitution stands for the proposition that government has no power to restrict expression because of its message, ideas, subject matter or content. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Freedom of speech and the other freedoms encompassed by the First Amendment have always been viewed as fundamental components of the liberty safeguarded by the Due Process Clause. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978), citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925). No one particular form of "protected" speech is entitled to or may be accorded a greater or lesser degree of protection than another. *Louisiana Life*, 504 So.2d at

903. Moreover, a tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. *Minneapolis Star*, 460 U.S. at 582.

Petitioners' claims are obviously intertwined with interests arising under the Equal Protection Clause. Since the Ordinance directly implicates the freedom of speech, it should be analyzed primarily in First Amendment terms. *See Arkansas Writers' Project,* 481 U.S. at 227 n.3.

Taxation of First Amendment speakers is constitutionally suspect if the tax:

a. Singles out taxpayers exercising the fundamental right of Free Speech for special taxation, *Minneapolis Star,* 460 U.S. at 592, *Arkansas Writers' Project,* 481 U.S. at 229-232;

b. Threatens to or has the potential to suppress the expression of particular ideas or view points, *Leathers,* 499 U.S. at 447;

c. Targets a small group of speakers, *Minneapolis Star, supra* at 591; or

d. Discriminates on the basis of content, *Arkansas Writers' Project, supra* (". . . the basis on which Arkansas differentiates between magazines is

> particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content.")*. [Emphasis added].

If a tax satisfies any of these criteria, it is constitutionally suspect and may not stand absent a compelling government interest or justification suitably furthered by the differential treatment. The tax legislation must be narrowly drawn to achieve such an interest. *Leathers, supra, Arkansas Writers' Project, supra*, and *Minneapolis Star, supra*. This standard of review is commonly referred to as "strict scrutiny" or heightened review, and has been articulated by this Court in the above cited cases.

Nonetheless, in its Reasons for Judgment (App. C-4) denying Petitioners' Motion for Partial Summary Judgment, the trial court stated that:

> In order to challenge tax legislation, the taxpayer must show that the tax is discriminating and is directed at or presents the danger of suppressing particular ideas. *This burden must be met by showing an "intent to suppress speech or any effect on the expression of particular ideas.*

[Emphasis added]. This is not a correct statement of constitutional law. The trial court did not cite any authority for this remark.

This Court ruled in *Minneapolis Star*, 460 U.S. at 592,

that an, " . . . intent to suppress speech or any effect on the expression of particular ideas . . ." was not a necessary factor in determining whether a taxing statute places an unconstitutional burden on the exercise of free speech and stated that:

> Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment . . .We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.

The above cited cases clearly show that an intent to discriminate is not necessary in proving the unconstitutionality of legislation under the First Amendment. Petitioners should not be forced to make such a showing.

When legislation impinges on a fundamental right, such as the right to engage in Free Speech, it is also subject to heightened review under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. In its Reasons for Judgment (App. C-5), the trial court stated that:

> [S]tates are given wide discretion in formulating tax schemes and if the selection or classification is neither capricious or arbitrary and rest upon some reasonable contribution of difference[sic] or policy, there is no denial of the equal protection of the law.

This statement of law is only correct if the abridgment of a fundamental right is not involved. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (where this Court recognized that a classification will warrant some form of heightened review when it jeopardizes the exercise of a fundamental right). Therefore, the trial court also applied an incorrect rule of law in determining that there is no denial of equal protection in the City's taxation of Petitioners under the Ordinance. When protected fundamental rights are involved, the strict scrutiny/compelling state interest standard is to be used by courts in determining whether or not equal protection of the laws is being afforded to litigants. *See Leathers*, 499 U.S. at 447.

Strict or exacting scrutiny requires that there exist a compelling state interest which justifies the encroachment on the fundamental right at issue. *Federal Election Commission v. Massachusetts Citizens For Life*, 479 U.S. 238, 256 (1986). This Court enunciated this standard of review as follows, "In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 231. This heightened standard of review for the violation of the fundamental right to engage in Free Speech was recently used by the Louisiana First Circuit Court of Appeal in *Louisiana Life, Ltd. v. McNamara*, 504 So.2d at 903, which stated that, "A tax that burdens rights protected by the First Amendment of

the Constitution of the United States cannot stand unless the burden is necessary to achieve an overriding governmental interest."

II. Strict Scrutiny Should Have Been Used to Evaluate the Ordinance Because It Burdens Petitioners' Fundamental Rights

A. The Amusement Tax Targets a Small Group of Taxpayers Engaged in First Amendment Activities

In its Reasons for Judgment (App. C-4), the trial court made clearly erroneous conclusions of both law and fact when it stated:

> Further, the number of entertainment activities demonstrates that the tax does not single out a small number of movie theaters demonstrating that the plaintiffs were not being targeted in an attempt to interfere with their First Amendment activities.

It appears that this faulty conclusion rests on the single fact that the Ordinance, in Section 150-276 of the City Code (App. D-7), sets forth twenty-eight (28) activities or amusements that are subject to the Amusement Tax. This conclusion, however, ignores certain crucial facts, which are discussed below.

More than sixty (60%) percent of the activities deemed taxable by the Ordinance involve the exercise of Free Speech. Section 150-276 of the City Code. However,

these Free Speech activities pay more than ninety-four (94%) percent of the total taxes collected under the Ordinance.

Due to the many exemptions from the Amusement Tax that have been granted over the years by the City Council, the Ordinance targets a very small number of taxpayers to bear the tax and discriminates based on content of taxpayer speech. On its face the Ordinance appears to tax a great many activities, but through the elaborate system of exemptions provided in Section 150-241 and Section 150-243 of the City Code,[3] very few of the activities are actually taxed. Only **00.67%** percent of the businesses in the City filing sales tax returns (159 out of 23,524) were actually subject to the Amusement Tax in 1994. Of the 159 businesses paying the tax, the three (3) Petitioners currently pay twelve (12%) percent of the Amusement Tax

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[3] For example, exemptions from the Amusement Tax are currently enjoyed by the Audubon Zoo and the Aquarium of the Americas, river boats, numerous Super Bowl football games, the Bayou Classic football game between Southern and Grambling Universities, facilities exhibiting live entertainment which have fixed seating capacities of at least one thousand eight hundred (1800) persons (which includes the Louisiana Superdome, the Kiefer U.N.O. Arena, and the Ernest N. Morial Convention Center), the New Orleans Museum of Art and the Jazz & Heritage Festival. See Appendix D-1 for other exemptions, including content based exemptions.

collected by the City.[4]

The small class of taxpayers who bear the brunt of this special tax will be made even smaller when the live music exemption from the tax takes effect. M.C.S. 17497, the ordinance establishing this exemption can be found at Appendix F-1. This exemption will be available for establishments providing music performed by a musician or musicians physically on the premises during the time the performance is taking place and is designated in Section 150-243(15) of the City Code. In fact, the three (3) Petitioners alone will be paying nearly one-half (50%) of the revenue collected by the City under the Ordinance, thereby bearing the heaviest burden of this discriminatory tax.

Most importantly though, in making the statement that, " . . . the number of entertainment activities demonstrates that the tax does not target a small group of speakers . . .", the trial court misconstrues the meaning and holding of this Court in *Minneapolis Star*. In *Minneapolis Star*, 460 U.S. at 591 it was found that the Minnesota ink and paper tax violated the First Amendment *not only* because it singled out a protected fundamental right (freedom of the press), *but also* because it targeted a small group of newspapers.

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[4] All of the facts set forth in this Petition come from admissions by the City and statements by officials of the City made in pre-trial discovery. See Appendix E-1.

The effect of the $100,000 exemption[5] enacted in 1974 was that only a handful of publishers paid the tax at all, and even fewer paid a significant amount of the tax.[6] Thus, this Court found that the tax in *Minneapolis Star*, 460 U.S. at 592, resembled a, "penalty for a few of the largest newspapers," rather than an attempt to favor struggling smaller enterprises, as only the largest newspapers remained subject to the tax after the exemption.

The Amusement Tax is structurally similar to the Minnesota tax struck down by this Court in *Minneapolis Star*. The fact that twenty-eight (28) activities or amusements are designated as being taxable under the Ordinance is irrelevant when, as a result of the exemptions

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[5] The State of Minnesota exempted the first $100,000 worth of paper and ink consumed annually in the production of publications from this special tax on First Amendment activities. *Minneapolis Star*, *supra* at 591.

[6] During the first year of the tax's operation, only eleven (11) publishers, producing only fourteen (14) of the state's three hundred and eighty-eight (388) paid circulation papers, incurred liability under the Minnesota tax. Star Tribune, the plaintiff in that case, who was one of only two publishers paying more than $100,000, paid $608,634 during that year. The following year, thirteen (13) publishers, producing only sixteen (16) of the state's three hundred and seventy-four (374) paid circulation papers, paid the tax. *As in the previous year, taxes collected from the plaintiff accounted for roughly two-thirds (⅔) of the revenue raised by the Minnesota tax. Minneapolis Star*, *supra* at 591 n.15. [Emphasis added].

that have been granted by the City Council, only a handful of City taxpayers actually end up paying the tax. A clear reading of the decision in *Minneapolis Star* shows that the rationale and holding of that case is not limited to legislation which nominates particular business enterprises as being responsible for such taxes. The State of Minnesota did not designate the large publishers, who in effect ended up bearing the burden of the tax, in its legislation imposing the tax. However, those few publishers were indirectly targeted to pay the tax as a result of the exemptions that were passed by the state legislature. That is exactly what has happened in the City with regard to the Amusement Tax and it has resulted in the targeting of a small number of taxpayers engaged in First Amendment Activities (including Petitioners).

In finding that the Minnesota tax on ink and paper was not part of the state's general scheme of taxation, this Court stated: "Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a *special tax* that applies only to certain publications protected by the First Amendment." [Emphasis added]. *Minneapolis Star*, 460 U.S. at 581. In the present case, the situation is worse than that in *Minneapolis Star* because the City imposes a general sales tax on the Petitioners' amusement activities in addition to the special Amusement Tax.

The number of businesses providing taxable

amusements constitute less than one (1%) percent of the businesses in the City subject to both the sales tax and the Amusement Tax and ninety-four (94%) percent of the Amusement Tax revenues are derived from businesses exercising First Amendment rights. How much smaller of a class of taxpayers need exist before it is obvious that the Amusement Tax targets a small group of businesses engaged in First Amendment activities? Further, in light of these facts, how can the trial court maintain its position that the City has not targeted Petitioners and the other businesses who are paying the Amusement Tax under the Ordinance?

B. The Ordinance Taxes or Exempts First Amendment Activities Depending Upon Content

The City has admitted the following:

1. that the determination that a rhythm and blues establishment located in the Vieux Carre will be subject to the Amusement Tax *is based purely on the content of the music being played* at that establishment (App. E-6);

2. the criteria listed in the statute for attaining the bona fide jazz club exemption requires the determination of the style, format, and the content of the music actually being

played (App. E-6);

3. City officials actually listen to the music and review the content to decide if the exemption will be granted (App. E-6);

4. The City sends an inspector to the establishment applying for the bona-fide jazz club exemption to make sure that the information contained in their application is valid within the context of the definition and to listen to the content and the style of the music that is considered "jazz" in order to determine if it meets the criteria of the exemption (App. E-6); and

5. The City's enforcement of the bona fide jazz club exemption has been expanded administratively to allow exemptions for rhythm and blues and zydeco music (App. E-7).[7]

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[7] The Administrative Services Supervisor of the Vieux Carre Commission, Mr. Lester Schwab, has admitted that he will grant clubs playing rhythm and blues, zydeco, Cajun zydeco and "that type of thing", exempted status from the Amusement Tax because those genres of music constitute "jazz" by his definition. However, Mr. Schwab stated that he will not approve establishments presenting heavy metal or rock and roll music for exempted status under the Ordinance. The City has admitted that The House of

Another example of content based regulation is that the Ordinance exempts restaurants from the Amusement Tax if the entertainment is live and instrumental, but taxes the restaurant when a singer is present.

The Ordinance is a content-based regulation which has the effect of suppressing the communication of those ideas contained in the motion pictures exhibited by Petitioners at their theatres as well as other taxpayers not meriting an exemption. Petitioners' theatres are not eligible for any of the numerous exemptions contained in the Ordinance because the content of the amusement that they provide is not favored by the City.

C. The City Has Created a Special Class of Taxpayers Involved in First Amendment Activities and Discriminates Within the Class

The Ordinance establishes a special class of taxpayers engaged in First Amendment Activities. As a result of the numerous exemptions, the Ordinance discriminates within the class without a compelling state interest. It blatantly encourages and discourages certain types of speech, based on content, the geographic location of the speech activity,

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Blues, a restaurant/music hall located in the City, is not eligible for the bona-fide jazz club exemption from the Amusement Tax based on the type and the content of the music that is played in that establishment (App. E-7)

and the size of the facility. A few examples are set forth below:

1. The "restaurant" exemption, which exempts from the Amusement Tax restaurants which provide only instrumental music for their patrons, Section 150-243 (7) of the City Code (App. D-3);

2. The "bona fide jazz establishment" exemption, Section 150-243 (11) of the City Code, discriminates on the basis of the content of the entertainment provided (App. D-4);

3. The Ordinance discriminates on the basis of the geographical location of the music hall exempting "bona fide jazz" establishments located in the Vieux Carre, but not similar establishments located elsewhere in the City, Section 150-243 (11) of the City Code (App. D-4);

4. The Ordinance discriminates on the basis of the size of the facility because a "bona fide jazz establishment," meeting all other criteria, but which seats less than sixty individuals, will be liable for the tax, Section 150-243 (11) of the City Code (App. D-4);

5. The "sports bar" exemption exempts from the Amusement Tax all admissions and concessions paid

at public facilities when productions are provided by cable or satellite TV subscriptions, Section 150-241 of the City Code (App. D-1); and

6. The "Superdome" exemption exempts from the Amusement Tax all admissions to events taking place in facilities which seat at least one thousand eight hundred (1,800) persons within the viewing area of any live entertainment, Section 150-243 (9) of the City Code (App. D-3). Admissions to small theatres or concert halls providing the same live entertainment that may be offered at the exempted facilities are taxed solely on the basis of the size of the facility providing the entertainment.

D. The City Must Advance Some Compelling State Interest Served By the Discriminatory and Content Based Ordinance Sufficient to Justify the Encroachment on Petitioners' Fundamental Rights

The trial court stated in its Reasons For Judgment that: "The aid to charitable institutions is clearly reasonable and is neither capricious or arbitrary . . ." (App. C-5). However, since the legislation being reviewed burdens a fundamental right protected by the First and Fourteenth Amendments, it does not matter that the purpose of the Ordinance is deemed to be reasonable because it is not being tested for a rational basis. Nor does it matter that the trial court noted that the Ordinance was neither capricious or arbitrary. Rather, the reviewing court must determine

whether or not the City has shown some compelling state interest served by the Ordinance that cannot be achieved by any less intrusive means than the current form of the statute imposing the Amusement Tax.

The stated objective of the Ordinance, raising funds for public and quasi public charitable institutions operated by the City Department of Welfare and for human services programs, is not a compelling state interest. It has been found by this Court that raising revenue may be an important interest, but standing alone, it does not explain or support selective taxation based on content. *Arkansas Writers' Project,* 481 U.S. at 231.

CONCLUSION

This Petition for Certiorari should be granted so that Petitioners' claims under the U.S. Constitution will be afforded the level of review mandated by this Court for the encroachment by a government upon the fundamental right to engage in Free Speech. The City of New Orleans' burdensome and differential scheme of taxation must be evaluated for some compelling state interest that is being furthered by the content-based discriminatory Ordinance imposing the Amusement Tax on Petitioners, and the few remaining taxpayers still subject to the tax. The Louisiana courts must also ask whether or not the current form of the Ordinance is the least restrictive means of raising revenue for the City's social services.

Petitioners should not be forced to try this case under an incorrect standard of law when this Court has so clearly articulated the proper scope of review for their claims. Not only has this Court already established that heightened review must be used by Court's reviewing this type of infringement, but it has discussed that standard in a case whose facts are nearly identical to those in Petitioners' case. In *Minneapolis Star*, 460 U.S. at 593, this Court struck down a state taxing statute containing the same constitutional deficiencies that the City Ordinance is riddled with because that statute failed to pass strict scrutiny. The Civil District Court is aware of that case and has not seen fit to comply with its mandate. Petitioners, therefore, are in dire need of this Court's assistance.

Respectfully submitted,

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Attorneys for Petitioners,
United Artists Theatre Circuit, Inc.,
Landmark Theatre Corporation and
Movies, Inc.

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APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

MOVIES, INC. & M.I. THEATRES OF NEW ORLEANS, LLC
VS. **NO. 97-CC-2658**
CITY OF NEW ORLEANS

- - - - - - - - - - - - - - - - -

IN RE: Movies Inc.; M.I. Theatres of New Orleans; United Artists Theatre Circuit; Landmark Theatre Corp.; - Plaintiff(s); Applying for Supervisory and/or Remedial Writ; Parish of Orleans Civil District Court Div. "F" Number 94-19613; Civil District Court Div. "J" Number 95-2809, 95-74; to the Court of Appeal, Fourth Circuit Number 97CW-1649

- - - - - - - - - - - - - - - - -

January 9, 1998
Denied.

BJJ
PFC
WFM
CDK
JPV
CDT
JTK

LEMMON, J. not on panel.
Supreme Court of Louisiana
January 9, 1998
s/s John Olivier
Clerk of Court For the Court

APPENDIX B

MOVIES, INC. & M.I. THEATRES OF NEW ORLEANS, LLC	* NO. 97-C-1649 *
	* COURT OF APPEAL
VERSUS	*
	* FOURTH CIRCUIT
CITY OF NEW ORLEANS	* STATE OF LOUISIANA

* * * * * * * *

IN RE:	MOVIES, INC. AND M.I. THEATRES OF NEW ORLEANS, ET AL.
APPLYING FOR:	SUPERVISORY WRITS
DIRECTED TO:	HONORABLE YADA T. MAGEE, JUDGE HONORABLE NADINE M. RAMSEY, JUDGE CIVIL DISTRICT COURT, FOR THE PARISH OF ORLEANS DIVISIONS "F" & "J", C.D.C. #94-19613, 95-2809, 95-74

WRIT APPLICATION DENIED

Relators' application for supervisory writs is denied.

New Orleans, Louisiana this 24th day of September, 1997.

s/s Moon Landrieu

JUDGE MOON LANDRIEU

s/s Joan Bernard Armstrong
JUDGE JOAN BERNARD ARMSTRONG

s/s Patricia Rivet Murray
JUDGE PATRICIA RIVET MURRAY

A TRUE COPY
NEW ORLEANS

SEP 24 1997

s/s Danielle Schott CLERK
COURT OF APPEAL FOURTH CIRCUIT

APPENDIX C

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 94-19613 DIVISION "F" SECTION 10
c/w 95-2809
c/w 95-74

MOVIES INC. ET. AL.

VERSUS

CITY OF NEW ORLEANS, DEPARTMENT OF FINANCE, MARINA M. KAHN, DIRECTOR

JUDGMENT

This matter came for hearing on January 24, 1997.

PRESENT: CAROLINE LAFOURCADE AND MICHAEL MAYHALL, Attorneys for Plaintiffs, Movies Inc. Et. Al.
JACK HOFFSTADT, Attorney for Defendant, City of New Orleans

After considering the pleadings, memorandums and arguments of counsel.

IT IS ORDERED, ADJUDGED AND DECREED that the Motion For Partial Summary Judgment filed on behalf of Plaintiffs, Movies Inc. Et. Al. is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion For Summary Judgment, filed on behalf of defendant, City of New Orleans is hereby dismissed.

New Orleans, Louisiana, this 9th day of April, 1997.

s/s Nadine Ramsey
JUDGE NADINE M. RAMSEY
DIVISION "J"
D.R.S. II

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 94-19613 DIVISION "F" SECTION "10"
c/w 95-2809
c/w 95-74

MOVIES INC. ET. AL.

VERSUS

CITY OF NEW ORLEANS, DEPARTMENT

REASONS FOR JUDGMENT

In the instant case the plaintiffs Movies, Inc. assert that the amusement tax under Article IV, Chapter 150, Sections 241-317 is unconstitutional. The basis of their allegations is that the amusement tax impermissibly censors plaintiffs free speech activities and creates a special small class of taxpayers and unlawfully discriminates within the class of taxing members.

The plaintiffs assert that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. The plaintiffs also state that the amusement tax discriminates on the basis of content. For, example, if a restauranteur wishes to provide instrumental music for his patrons, the restaurant is exempt from paying the tax under

section 150-243 (7) of the New Orleans Code. However, is a restauranteur wishes to provide any singing with instrumental music or other form of entertainment, then the exemption does not apply under Section 152-243 (7) of the New Orleans Code.

In order to challenge tax legislation the taxpayer must show that the tax is discriminating and is directed at or presents the danger of suppressing particular ideas. This burden must be met by showing an "intent to suppress speech or any effect on the expression of particular ideas."

In the instant case, the plaintiffs compared various businesses which are engaged in the same entertainment activity. However, due to an allowed exemption not all of these businesses pay the amusement tax. The defendant asserts that the plaintiffs are one of 30 entertainment activities subject to the amusement tax.

Further, the number of entertainment activities demonstrates that the tax does not single our a small number of movie Theatres demonstrating that the plaintiffs were not being targeted in an attempt to interfere with their First Amendment activities. As it relates to the exemption, it is granted based on the kind of activity and the sponsor of such activity resulting in a non content based amusement tax.

In addition the plaintiffs assert that the amusement tax is violative of the Equal Protection Clause because the ordinance treats similarly situated taxpayers in the same class differently.

However, states are given wide discretion in formulating tax schemes and if the selection or classification is neither capricious or arbitrary and rest upon some reasonable contribution of difference or policy, there is no denial of the equal protection of the law.

The objective of the amusement tax is to provide funds for public and quasi public charitable institutions operated by the Department of Welfare and to provide funds for human services programs.

The aid to charitable institutions is clearly reasonable and is neither capricious or arbitrary and thus does not violate the Equal Protection Clause of Fourteenth Amendment. Therefore, based on the reasons cited above, the plaintiff's motion for partial summary judgment is hereby denied.

New Orleans, Louisiana, this 9th day of April, 1997.

s/s Nadine Ramsey
JUDGE, NADINE M. RAMSEY
DIVISION "J"
D.R.S. II

APPENDIX D

Selected Portions of the Code of the City of New Orleans, 1995, Chapter 150, Taxation, Article IV, Amusement Tax.

Sec. 150-241. Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Admission includes all amounts paid for admission, season tickets, refreshments, service and merchandise at any of the establishments set forth in section 150-276 or other similar place furnishing a public performance for profit. The term admission is further defined to include any charge or fee for the purpose of self-participation in any amusement activity as outlined in section 150-276.

Exhibition includes, but is not limited to, zoological, aquatic and botanical exhibitions.

Production includes, but is not limited to, in addition to those amusements specifically listed in section 150-276, any entertainment provided on the premises by a disc jockey or similar entertainer and any audiovisual production, wherever shown, which is obtained by payment of a rental fee, subscription or similar charge, including but not limited to cable or satellite TV subscriptions and rental of videotapes, video games and computer games. When a production provided by cable or satellite TV subscription is presented in a public place, the amusement tax shall be levied only on the cost of the

subscription or rental fee of the cable or satellite TV production but shall not be assessed on the purchases made by consumers in the facility where the cable or satellite TV production is being shown.

§ 150-243. Exemptions.

No tax shall be levied under this article in respect to any admission:

(1) To any church fair, church card or lotto party, church lecture, church picnic or religious festival, all of the proceeds of which inure to the benefit of a religious institution.

(2) To any charitable benefit the proceeds of which inure exclusively to the benefit of a charitable institution.

(3) Charged the students or members of the faculty of any school or university which charges an admission fee in connection with the activities of such school or university; nor shall any tax be levied in respect to free passes issued by such school or university.

(4) To any admission to rides in amusement parks situated on public or private property of $0.50 or less charged children and juveniles under the age of 17.

(5) To any circus whose profits inure exclusively to the benefit of a charitable institution.

(6) To any symphony, concert, opera, theatrical production or any other cultural event produced or staged by a nonprofit organization.

(7) To admission charges or payments paid at a restaurant where the primary or principal business or revenue is the sale of food and where there is no entertainment except instrumental music. If singing, dancing or other forms of entertainment are offered in such restaurant, then this exemption shall not apply.

(8) Notwithstanding the above, if any part of the proceeds derived from any event described in section 150-276 inure to the benefit of any promoter, producer, or any other individual connected with the event, the exemption does not apply to such part of the proceeds to which the promoter, producer or individual may be entitled.

(9) Which constitutes a charge or price paid for a ticket, card of admission, or other evidence of a right to enter upon the premises and to view or participate in any live entertainment event held in any facility which is primarily used for entertainment events and which has a fixed seating capacity of at least 1,800 persons within the viewing area of the live entertainment, provided that this exemption shall not apply to any other expenditure which is taxable under this article.

(10) To any aerial gondola system that operates under a franchise from the city.

(11) To a bona fide jazz establishment located within the boundaries of the Vieux Carre or operating as an excursion or sightseeing steamer which is not licensed for gaming activities. For the purposes of this article, a bona fide jazz establishment shall be defined as a commercial establishment or excursion or sightseeing steamer which is not licensed for gaming activities which meets the following criteria:

a. It offers only performances of traditional jazz, a small combination art form of contrapuntal melody improvised above a steady rhythmic beat, performed by one or more instrumental and/or vocal musicians, usually playing piano, bass, drums, clarinet or saxophone, trumpet, and trombone and sometimes including vocalists (scat singers);

b. It provides a scheduled program of such music for not less than 24 hours per week for a minimum of 46 weeks per year;

c. It has a permanent seating capacity of at least 60 persons within the viewing area of the live entertainment; and

d. It serves food and/or beverages.

Application for this exemption shall be made annually to the department of finance, which shall approve the exemption for a maximum of 12 months only upon certification by the staff of the Vieux Carre commission or for an application by an excursion or sightseeing steamer, upon certification by the staff of the safety and permits commission that the applicant meets all of the criteria set forth in this section. The exemption is nontransferable. If, after an exemption is approved under this section, the staff of the Vieux Carre Commission or the staff of the department of safety and permits determines that the establishment enjoying the exemption no longer meets all of the criteria set forth in this subsection, the department of finance shall immediately revoke the exemption previously approved and the establishment shall be obligated to remit the amusement tax imposed under section 150-276 and to submit to the department of finance, pursuant to section 150-313 a report or reports of the business gross receipts, reckoning from the date upon which the exemption was revoked. The exemption from the payment of the tax for a bona fide jazz establishment shall be applicable only when the admission of patrons occurs while traditional jazz is actually being performed.

(12) On purchases at any museum operated by a public or private nonprofit entity which received a total of $700,000.00 or less in the

immediately preceding fiscal year from admission charges and season tickets.

(13) No tax shall be levied under this article in respect to any purchases of tickets to rides offered on the premises; rentals of equipment for personal use of patrons, such as wheelchairs and strollers; or merchandise in a gift shop which is operated on the premises of and ancillary to the operation of a zoological garden or aquarium when sales tax on such purchases is colleted from the purchaser.

(14) To the Audubon Zoo or the Aquarium of the Americas when such admission occurs on or after January 1, 1992.

Sec. 150-276. Tax imposed.

There is hereby levied a tax for the purpose of providing funds for public and quasipublic charitable institutions operated by the department of welfare and, upon a surplus of such funds, to human services programs as determined by the council as authorized by the R.S. 4:41 through 4:45. The tax shall be five percent on the gross receipts representing admission charges to any theatre, motion picture house, athletic contest, exhibition, pageant, production, demonstration, flower show, concert, musicale, recital, circus, freak show, minstrel show, lecture, address, nightclub, cabaret, dance, dancehall, restaurant which provides either floor show, singing, dancing or dancing facilities to patrons; excursion and sightseeing steamer which receives and discharges passengers in the same parish or municipality, aviation

pleasure ride that takes on and discharges passengers in the same parish or municipality, scenic railway, flying horse or merry-go-round, shooting gallery and any game of skill and chance as well as all mechanical devices operated for pleasure or skill where a fee is charged for admission or entrance or for the purpose of playing them or wether there is any charge whatever for them or in connection with them either directly or indirectly or where admission is had by a season ticket.

Sec. 150-315. Use of proceeds of tax.

(a) All moneys derived from the amusement tax including interest accrued on the excess revenues over expenditures imposed by this article shall be used solely for public and quasi-public charitable institutions operated by the department of welfare, and upon a surplus of such funds, to human service programs, as determined by the council. The funds shall be deposited in the general fund and shall be expended in accordance with this article, as provided by R.S. 4:45.

(b) The city board of welfare shall make recommendations to the council as to the use of any surplus funds, including the type of human service programs which should receive such funds prior to determination by the council of the disposition of such funds.

APPENDIX E

Source of Undisputed Facts Admitted by the City of New Orleans

I.

The City, in its Answer to Plaintiffs' Amended and Restated Petition For Refund of Taxes and Declaratory Judgment and in response to Request for Admissions, has admitted that:

a. Plaintiffs are engaged in business activities protected under the First Amendment of the United States Constitution and under Sections 3 and 7 of Article 1 of the Louisiana Constitution of 1974;[1]

b. As part of their motion picture exhibition businesses, Plaintiffs exhibit for public display, through licensing agreements with various movie distributors, movie pictures of various content;[2]

c. As a further part of their motion picture exhibition businesses, Plaintiffs offer concessions for sale to movie patrons who visit their theatres;[3]

d. Plaintiffs have the freedom to display any type of motion picture that they desire on their screens, depending upon

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[1] Paragraph VII of Answer. All references to the "Answer" below are to the Answer filed in this case by the City in the Civil District Court for the Parish of New Orleans, unless otherwise indicated.

[2] Paragraph VII of Answer.

[3] Paragraph VII of Answer.

availability from various movie distributors;[4]

e. While the films that Plaintiffs display in their theatres are a source of entertainment, they also contain political, economic and social statements;[5]

f. Plaintiffs display films that educate, that advocate political, social and economic ideas of the producers, writers and/or directors of the films, and that entertain the movie patrons;[6]

g. The movie patrons come to see the public display of movie films in Plaintiffs' theatres in order to learn the political, social and economic statements of the producers, writers and/or directors of the films displayed in Plaintiffs' theatre and in order to be entertained;[7]

h. The City of New Orleans, through the Ordinance, taxes the right to view movie films shown by Plaintiffs in the movie theatres in the City of New Orleans;[8]

i. The Ordinance is not a tax of general applicability on businesses in the City of New Orleans and it is not applicable to the business community at large;[9]

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[4] Paragraph VII of Answer.

[5] Paragraph VII of Answer.

[6] Paragraph VII of Answer.

[7] Paragraph VII of Answer.

[8] Paragraph IX of Answer filed in Civ. Action No. 95-0017 in United States District Court for the Eastern District of Louisiana.

[9] City's Response to Request for Admission No. 19, a copy of which is attached as Exhibit "D" to the previously

j. The Amusement Tax authorized by the Ordinance is a tax in addition to the general sales tax on the sale of tangible personal property;[10]

k. The Ordinance creates a special class of taxpayers based on whether the taxpayer provides "Amusements" as defined in the Ordinance;[11] and

l. The Plaintiffs are members of the class of taxpayers created by the Ordinance.[12]

II.

Further, in Paragraph IX of its Answer to Plaintiffs' Amended and Restated Petition for refund of Taxes and Declaratory Judgment, the City admitted the following allegation:

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filed Statement of Undisputed Facts in Support of Motion For Partial Summary Judgment.

[10] City's Response to Request for Admission No. 21, a copy of which is attached as Exhibit "D" to the previously filed Statement of Undisputed Facts in Support of Motion For Partial Summary Judgment.

[11] City's Response to Request for Admission No. 23, a copy of which is attached as Exhibit "D" to the previously filed Statement of Undisputed Facts in Support of Motion For Partial Summary Judgment.

[12] City's Response to Request for Admission No. 24, a copy of which is attached as Exhibit "D" to the previously filed Statement of Undisputed Facts in Support of Motion For Partial Summary Judgment.

Plaintiff [Petitioners] is a member of a class which provides entertainment in the City of New Orleans through the exercise of Free Speech, an activity protected by the First Amendment of the United States Constitution.

III.

The City has testified in depositions[13] and in its responses to interrogatories that:

a. In 1995, twenty-three thousand five hundred twenty-four (23,524)businesses filed annually sales tax returns with the City. (Monthly sales tax filers totaled 14,575 as of December, 1995).[14]

b. One hundred fifty-nine (159) business outlets were subject to the Amusement Tax as of October, 1995,[15]

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[13] The City admitted these facts at the deposition of Anthony C. Riley, Revenue Collection Supervisor, Department of Finance.

[14] City's Response to Interrogatory No. 2, a copy of which was attached as Exhibit "G" to the previously filed Statement of Undisputed Facts in Support of Motion For Partial Summary Judgment. It was more recently stated in the City's response to a Request for Production of Documents No. 1, a copy of which was attached as Exhibit "H" to the previously filed Statement of Undisputed Facts in Support of Partial Summary Judgment, that the City has sixteen thousand (16,000) monthly filers and that "[T]his number is relatively constant with a two (2%) percent growth rate from year to year."

[15] City's Response to Interrogatory No. 3, a copy of which was attached as Exhibit "G" to the previously filed Statement of Undisputed Facts in Support of Partial

c. Gross sales subject to sales tax in the City for 1993 through 1995 are as follows[16]:

1993: $1,779,861,380.00
1994: $1,862,166,660.00
1995: $1,986,549,900.00

d. Gross revenues from businesses subject to the Amusement Tax in the City are as follows[17]:

1993: $1,959,534.00
1994: $2,324,346.00
1995: $1,915,010.00

IV.

At the deposition of Ernest L. Lumpkins, Sr., Assistant Collector of Revenue, Department of Finance, the City admitted the following:

a. that the determination that a rhythm and blues establishment located in the Vieux Carre will be subject to the Amusement Tax *is based purely on the content of the*

Summary Judgment. The Ordinance taxes **00.67%** percent (159 out of 23,524) of the businesses in the City filing sales tax returns;

[16] City's Response to Request for Production of Documents No. 2, a copy of which was attached as Exhibit "H" to the previously filed Statement of Undisputed Facts in Support of Partial Summary Judgment.

[17] City's Response to Request for Production of Documents No. 4, a copy of which was attached as Exhibit "H" to the previously filed Statement of Undisputed Facts in Support of Partial Summary Judgment.

music being played at that establishment;[18]

b. the criteria listed in the statute for attaining the bona fide jazz club exemption requires the determination of the style, format, and the content of the music actually being played;[19] and

c. Vieux Carre staff actually listen to the music and review the content to decide if the exemption will be granted.[20]

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[18] Page 181, Line 13, a copy of which was attached as Exhibit "I" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court.

[19] Page 183, Line 25 *ff.*, a copy of which was attached as Exhibit "J" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court.

[20] Page 186, Line 22 *ff.*, a copy of which was attached as Exhibit "K" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court. Further, at deposition of Lester F. Schwab, Jr., Administrative Services Supervisor, Vieux Carre Commission, (page 22, Line 3 *ff.*, a copy of which was attached as Exhibit "L" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court), the City admitted that the Vieux Carre Commission sends an inspector to the establishment applying for the bona-fide jazz club exemption to make sure that the information contained in their application is valid within the context of the definition. It was further admitted that Vieux Carre Commission inspectors listen to the content and the style of the music that is considered "jazz" in order to determine if it meets the criteria of the exemption. Deposition of Lester F. Schwab, Jr., Administrative Services Supervisor, Vieux Carre Commission, page 26, line 16. See

More interestingly, the enforcement of the bona fide jazz club exemption has been expanded administratively to allow exemptions for rhythm and blues and zydeco music.[21] However, the City has admitted that The House of Blues, a restaurant/music hall located in the City, is not eligible for the bona-fide jazz club exemption from the Amusement Tax based on the type and the content of the music that is played in that

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Exhibit "L" to the previously filed Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment.

[21] At the deposition of Lester F. Schwab, Jr., Administrative Services Supervisor, Vieux Carre Commission, pages 40-41, a copy of which was attached as Exhibit "Q" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court, the City admitted that:

(1) The Vieux Carre Commission has granted exemptions to clubs or establishments who play music that is not "Jazz" but may be indigenous to New Orleans; and

(2) Mr. Schwab will grant clubs playing rhythm and blues, zydeco, Cajun zydeco and "that type of thing", exempted status from the Amusement Tax because those genres of music constitute "jazz" by his definition. However, Mr. Schwab stated that he will not approve establishments presenting heavy metal or rock and roll music for exempted status under the Ordinance.

establishment.[22] Furthermore, the City has stated that Chris Owens' club was denied the bona-fide jazz club exemption based on the content and amount of jazz being exhibited.[23]

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[22] This was admitted by the City at the deposition of Ernest L. Lumpkins, Sr., Assistant Collector of Revenue, Department of Finance, page 190, line 17, 21, a copy of which was attached as Exhibit "R" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court. Lester F. Schwab, Jr., Administrative Services Supervisor, Vieux Carre Commission, (page 33, line 3, a copy of which was attached as Exhibit "S" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court), stated during his deposition that The House of Blues would not qualify for the bona-fide jazz club exemption because of the varied type of musical performances exhibited there.

[23] Deposition of Lester F. Schwab, Jr., Administrative Services Supervisor, Vieux Carre Commission, page 30, line 11, a copy of which was attached as Exhibit "T" to the Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment filed in the trial court.

APPENDIX F

ORDINANCE
(AS AMENDED)
CITY OF NEW ORLEANS

CITY HALL: September 1, 1994
CALENDAR NO: 19,491

NO: 17497 MAYOR COUNCIL SERIES
BY: COUNCILMEMBER WILSON

AN ORDINANCE to amend Section 6-4 of Chapter 6 of the City Code to add a new paragraph 15, to exempt from the Amusement Tax establishments providing music performed by musicians physically on the premises during the time that such performance is taking place, to provide for an effective date, and otherwise to provide with respect thereto.

SECTION 1. THE COUNCIL OF THE CITY OF NEW ORLEANS HEREBY ORDAINS, That Section 6-4 of the City Code is hereby amended to add a new paragraph 15 to read as follows:

Section 6-4. Exemptions.

No tax shall be levied under this chapter in respect to any admission:

(15) To any establishment providing music performed

by a musician or musicians physically on the premises during the time the performance is taking place, provided that during any times in which said establishment offers any other type of activity subject to the Amusement Tax, the tax shall be due and collectible.

SECTION 2. This exemption shall become effective on the first day of the month immediately following the effective date of an ordinance which appropriates sufficient recurring revenues to the budget to cover the estimated cost of this exemption and reduces the Amusement Tax appropriation to reflect the estimated cost of this exemption.

ADOPTED BY THE COUNCIL OF THE CITY OF NEW ORLEANS April 18, 1996

PEGGY WILSON
PRESIDENT OF COUNCIL

DELIVERED TO THE MAYOR ON April 19, 1996

APPROVED:
DISAPPROVED: April 26, 1996

MARC H. MORIAL
MAYOR

RETURNED BY THE MAYOR ON April 29, 1996 AT 11:50 a.m.

EMMA J. WILLIAMS
CLERK OF COUNCIL

YEAS:	Carter, Glapion, Hazeur, Singleton, Terrell, Thomas, Wilson - 7
NAYS:	0
Absent:	0